APPEAL NO. 92141

On March 4, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, appellant herein, sustained an injury while in the course and scope of her employment on (date of injury), but that she did not report her injury to her employer within 30 days and that she did not have good cause for failing to report her injury earlier. Accordingly, the hearing officer decided that appellant is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant agrees with the determination that she sustained an injury in the course and scope of her employment, but disagrees with the determinations on failure to report the injury within 30 days and lack of good cause for failing to do so. Appellant requests that we reverse the decision of the hearing officer on the determinations she disagrees with and render a decision that she timely reported her injury or, in the alternative, that she had good cause for failing to timely report her injury.

Respondent, the employer's workers' compensation insurance carrier, requests that we affirm the determinations of the hearing officer on the issues of notice and good cause. In the event we reverse those determinations, respondent requests in the alternative that we reverse the hearing officer's determination that appellant sustained an injury in the course and scope of her employment.

DECISION

The hearing officer's decision that appellant sustained an injury in the course and scope of her employment on (date of injury), is affirmed. The hearing officer's decision that appellant failed to give timely notice of her injury to her employer is reversed, and a new decision is rendered that the employer was given timely notice of appellant's injury.

For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). Failure to give timely notice relieves the employer and the employer's insurance carrier of liability under the 1989 Act unless the employer, the carrier or a person eligible to receive notice has actual knowledge of the injury, or unless the Commission determines that good cause exists for failure to give notice in a timely manner, or unless the employer or carrier does not contest the claim. Article 8308-5.02.

Appellant claimed she sustained a work-related back injury on (date of injury), and gave timely notice of her injury to her employer. The 30th day after the date of injury was October 10, 1991, a Thursday. *See* Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE Sec.

102.3(a) regarding computation of time. The hearing officer found that appellant reported her injury to her employer on October 11, 1991, and concluded that appellant did not report her injury to her employer within 30 days. Thus, appellant was determined not to be entitled to benefits because she was one day late in giving notice of her injury to her employer.

Succinctly, appellant testified that she injured her back lifting a box of supplies at work on (date of injury), was told by her doctor on October 1st that he thought she had a disc rupture, notified her supervisor, Mr. C, on October 2nd that she had sustained a work-related back injury on (date of injury), filed her claim for compensation with the Texas Workers' Compensation Commission on October 10th, and again notified her supervisor of her work-related injury on October 11th.

Mr. C testified that he was appellant's supervisor. He denied that appellant reported a work-related injury to him on October 2, 1991. He testified that the first he was aware that appellant was claiming an on-the-job injury was on October 11th when he called appellant at her home and she told him she had hurt her back lifting a box at work on September 10th. However, appellant's supervisor also testified that:

"October the 11th I called her in the morning, she had missed work the day before, and I had received a message from one of the people that work with me that her mother had called in and said that she had injured herself on the job. I called her the next morning and talked with [appellant] and she had told me at that time that she had hurt her back moving a box in the accounting file room on September the 10th."

Appellant's supervisor further testified that he received appellant's mother's telephone message in written form about 5:30 p.m. on October 10th, the 30th day after the date of the injury. In addition to his previous testimony that appellant's mother said appellant had injured herself on the job, the supervisor stated that appellant's mother said in her telephone message of October 10th that appellant's back was injured and that she would not be back to work until after October 15th. Appellant was scheduled for an MRI scan on October 15th.

The hearing officer had the responsibility to resolve the conflicting testimony on whether appellant reported her injury to her supervisor on October 2, 1991. The hearing officer was entitled to believe the supervisor's testimony that notice was not given on that day and to disbelieve appellant's testimony that notice was given on that day. *See* R. J. McGalliard v. Kuhlmann, 722 S.W.2nd 694, 697 (Tex. 1987). Thus, we do not take issue with the hearing officer's failure to find that notice was given on October 2, 1991. We also do not take issue with the hearing officer's finding that "claimant reported her injury to her employer on October 11, 1991." There is sufficient evidence of record to support that finding, but only insofar as that finding relates to appellant herself giving notice of injury to her employer.

What concerns us in this case is that the hearing officer's decision ignores the

supervisor's uncontradicted testimony that he was told by a coworker on October 10th that appellant's mother had called the employer's office that day and reported that appellant had injured herself on the job and had a back injury. Article 8308-5.01(a) specifically provides for notice of injury to be given by "[a]n employee or a person acting on the employee's behalf. . . ." Clearly, appellant's mother was acting on appellant's behalf when she called the employer's office and left her telephone message. Of course, appellant's supervisor was a person authorized to receive notice of injury under Article 8308-5.01(c), and his testimony showed that he received appellant's mother's telephone message on the 30th day after the date of injury. Notice of injury to the employee's immediate supervisor is notice to the employer. Texas Indemnity Insurance Company v. Arant, 171 S.W.2d 915, 917 (Tex. Civ. App.-Eastland 1943, writ ref'd w.o.m.). The fact that a coworker acted as an intermediary in transmitting the telephone message from appellant's mother to the supervisor is of no consequence. *See* Traveler's Insurance Company v. Miller, 390 S.W.2d 284, 286 (Tex. Civ. App.-El Paso 1965, no writ) wherein the court said that the notice provision does not specify that the claimant himself must give the notice.

In DeAnda v. Home Insurance Company, 618 S.W.2nd 529, 532-533 (Tex. 1980), the Supreme Court of Texas stated that the purpose of the notice of injury provision is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. The court said that this purpose can be fulfilled without the need of any particular form or manner of notice. The court further stated that, to fulfill the purpose of the statute, the employer need only know the general nature of the injury and the fact that it is job related, and that more details of the occurrence will be supplied by the claim.

We conclude that appellant's supervisor's uncontradicted testimony establishes that he was notified by appellant's mother on October 10th that appellant sustained a back injury and that her back injury was job related. The evidence further establishes that appellant's mother was acting on appellant's behalf in giving notice of injury and that appellant's supervisor was a person eligible to receive such notice. We also conclude that since October 10th was the 30th day after the date of injury, notice of injury was timely under Article 8308-5.01(a). Having reviewed all the evidence of record, we find that the hearing officer's conclusion that notice of injury was not given within 30 days, and his decision that notice of injury was not timely, are so against the great weight and preponderance of the evidence as to be manifestly unjust. Accordingly, we reverse that decision and we render a new decision that timely notice of injury was given to the employer.

Having ruled in appellant's favor on the issue of timely notice, we do not reach appellant's alternate contentions concerning due process and good cause for late notice.

We next address respondent's cross-appeal. Respondent's filing on appeal consists of one document which is divided in to two main parts: the first part responds to the issues on which appellant requests review, and the second part is designated a "cross-appeal" and requests review and reversal of the hearing officer's determination of injury in the course and scope of employment in the event we reverse the hearing officer's

determinations on late notice and good cause. We find that respondent's "cross-appeal" of the hearing officer's determination that appellant sustained an injury in the course and scope of her employment was not timely filed. Respondent's "cross-appeal" is an appeal of the decision of the hearing officer which should have been filed not later than the 15th day after the date on which the decision of the hearing officer was received. Article 8308-6.41(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3). The hearing officer's decision was sent to the parties on March 18, 1992. Since the date of receipt of the decision is not indicated in respondent's filing, we apply Rule 102.5(h) which provides in part that: "the Commission shall deem the received date to be five days after the date mailed." Consequently, respondent is deemed to have received the decision on March 23, 1992. Thus, its appeal should have been filed by April 7, 1992. The filing containing the cross-appeal is dated April 23, 1992, and it was received in the Commission' central office in Austin, Texas, on that date. Since respondent's cross- appeal was not timely filed it will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92109 (Docket No. WA-00072-A-CC-1-WA41) decided May 4, 1992. However, we have considered that portion of respondent's filing which actually responds to appellant's request for review since it was timely filed within 15 days of respondent's receipt of appellant's request for review. Article 8308-6.41(a); Rule 143.4(a)(3).

The hearing officer's decision that appellant sustained a compensable injury on (date of injury), is affirmed. The hearing officer's decision that appellant failed to give timely notice of her injury to her employer is reversed, and a new decision is rendered that timely notice of appellant's injury was given to the employer and that appellant is entitled to medical benefits and income benefits in accordance with the provisions of the 1989 Act.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge